# STATE OF MICHIGAN

# COURT OF APPEALS

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ALONZO D. AUSTIN,

Plaintiff-Appellant,

v

WAYNE STATE UNIVERSITY, MICHAEL A. ELLICOTT and ROBERT P. YOUNG,

Defendants-Appellees.

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UNPUBLISHED
June 12, 2001

No. 220169
Wayne Circuit Court
LC No. 98-806346-NO

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). On appeal, plaintiff argues that summary disposition was improper as to defendant, Robert P. Young and that the trial court improperly denied leave to amend the complaint. We affirm in part and reverse in part.

Plaintiff was employed in the custodial services department at Wayne State University (Wayne), beginning in 1973. Plaintiff was terminated on November 20, 1997. At the time of his termination, plaintiff was an at-will employee. Plaintiff filed suit against Wayne, Young (his supervisor), and Young's superior, Michael A. Ellicott, alleging that he was fired because he had refused to testify falsely in the arbitration hearing of a fellow employee. The trial court dismissed plaintiff's claims on the basis of governmental immunity, and refused to allow him to amend his complaint to add specific allegations that Young had directed him to lie at an arbitration hearing in violation of the perjury statutes, that Young was subject to an exception to governmental immunity pursuant to MCL 691.1407(2)(c); MSA 3.996(107), and to plead that he was fired in violation of Const 1963, art 1, § 17 and 42 USC 1983. Plaintiff appeals the trial court's dismissal only as it applies to Young. According to the trial court, Young was neither acting on his own behalf nor grossly negligent when he fired plaintiff. It therefore determined that Young was immune from liability for plaintiff's claims. The trial court denied plaintiff's motions to amend his complaint on the basis that the proposed additions were either futile or moot due to Young's immunity.

Plaintiff first argues that, because Young was not entitled to governmental immunity, the trial court erred when it granted summary disposition in Young's favor. The grant or denial of summary disposition is a question of law that we review de novo on appeal. *Spiek v Dep't of*

*Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Royce v Citizens Ins Co*, 219 Mich App 537, 540; 557 NW2d 144 (1996). When reviewing a summary disposition pursuant to MCR 2.116(C)(7), we must consider the entire lower court record, including pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999). Summary disposition is appropriate if the evidence shows that no exception to governmental immunity is applicable. *Dampier*, *supra* at 720; *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). Where there are no disputed material facts, whether plaintiff's claims are barred by governmental immunity is a question of law. *Cain v Lansing Housing Comm*, 235 Mich App 566, 568; 599 NW2d 516 (1999).

In his complaint, plaintiff alleged that Young fired him "in retaliation for his refusal to commit perjury," thereby violating the public policy of the State of Michigan. The trial court apparently agreed with defendants that because plaintiff's claim is for the tort of retaliatory discharge, Young was immune from liability pursuant to the governmental immunity act, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* The act provides for governmental immunity from tort liability only when all of the following conditions are met: (1) "[t]he . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority," (2) "[t]he governmental agency is engaged in the exercise of a governmental function," and (3) "[t]he . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2); MSA 3.996(197)(2). "Gross negligence" is conduct so reckless it demonstrates a substantial lack of concern for whether an injury results. *Id.*

We agree with the trial court's conclusion that plaintiff has not advanced a claim under the gross negligence exception described in MCL 691.1407(2); MSA 3.996(197)(2). There are no allegations or facts contrary to the conclusion that Young's decision to terminate plaintiff was deliberate and was within the scope of Young's authority. Therefore, we conclude that the circumstances of this case were legally insufficient to support a finding that Young acted with gross negligence.

However, the governmental immunity act does not shield an individual employee from liability for intentional torts. *Sudul v Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.), 480-481 (Murphy, J.); 562 NW2d 478 (1997). Where an intentional tort was not barred by governmental immunity before July 7, 1986, the tortious act does not qualify for governmental immunity under the statute. *Id.* at 480-481. Defendants concede in their brief on appeal that plaintiff has advanced a claim for retaliatory discharge. Where there is no statutory prohibition against retaliatory discharge, an at-will employee may still claim that his discharge violated public policy. *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997); *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 78; 503 NW2d 645 (1993). Such a public policy-based retaliatory discharge claim by an at-will employee does not arise out of any term agreed upon by the contracting parties, and therefore sounds not in contract but in intentional tort. *Phillips v Butterball Farms, Inc*, 448 Mich 239, 245-249; 531 NW2d 144 (1995). In *Watassek v Dept of Mental Health*, 143 Mich App 556, 565; 372 NW2d 617 (1985), this Court held that a retaliatory discharge claim was not barred by governmental immunity. Although the claim in that case was contractual in nature, the Court specifically noted that it would still not be subject

to governmental immunity if it were characterized as an intentional tort. *Id.* at 564-565. Subsequently, our Supreme Court questioned the *Watassek* decision to the extent that it characterized a wrongful discharge claim as contractual, and clearly established that a claim for wrongful discharge sounds in tort. *Phillips*, *supra* at 245-249. Finally, we note that long before the enactment of the governmental immunity act, immunity was not a defense to a claim of wrongful discharge; it therefore is not a defense today. *Sudul*, *supra* at 480-481; MCL 691.1407(3); MSA 3.996(197)(3). See *Powell v Battle Creek*, 169 Mich 19; 135 NW 79 (1912); *Paxson v Cass Co Rd Comm*, 325 Mich 276; 38 NW2d 315 (1949); *Lenz v Detroit*, 361 Mich 166; 105 NW2d 156 (1960).

In its opinion granting summary disposition to defendants Wayne and Ellicott, issued on March 16, 1999, the trial court found that if plaintiff were to amend his claim to set forth a theory under *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), plaintiff's claims for wrongful termination would survive summary disposition. On May 27, 1999, the trial court found that Young was immune from liability because he was not grossly negligent, he did not act outside the scope of his employment, and that a theory of tortious interference with an employment relationship was inapplicable to the instant case because there was no allegation that Young acted for his own personal benefit. The court made no distinction between wrongful discharge and tortious interference with a contractual relationship, even though Young was not acting on his own behalf as a third party (required for tortious interference). See *Dzierwa v Michigan Oil Co*, 152 Mich App 281; 393 NW2d 610 (1986); *Kocenda v Archdiocese of Detroit*, 204 Mich App 659; 516 NW2d 132 (1994). The trial court then determined, without further explanation, that an amendment consistent with a claim for wrongful termination would be moot because such a claim would be barred by its finding of governmental immunity. It did not discuss the intentional tort exception to governmental immunity and failed to recognize that, to the extent that plaintiff established a claim of retaliatory discharge, Young did not enjoy governmental immunity. Accordingly, the trial court erred when it granted summary disposition in favor of Young on the ground of governmental immunity.

Because Young was not immune from liability for plaintiff's allegations that he terminated plaintiff for his refusal to lie in the Hudgins arbitration, we next consider whether plaintiff set forth a claim for wrongful termination that should have survived summary disposition. An at-will employee can be discharged at any time without reason and generally has no recourse if the employer acts in an arbitrary and capricious manner. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993); *Bracco v Michigan Technological Univ*, 231 Mich App 578, 598; 588 NW2d 467 (1998). However, an at-will employee may have an action for wrongful discharge if the discharge was contrary to public policy. *Suchodolski*, *supra* at 694-696; *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 484; 516 NW2d 102 (1994). *Suchodolski* identifies three examples of this exception; contrary to defendants' argument, nothing in *Suchodolski* limits the exception to those three situations exclusively. These three examples include when (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty, (2) the employee is discharged for the failure or refusal to violate the law in the course of employment, and (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. *Suchodolski*, *supra* at 695-696; *Vagts*, *supra*.

The trial court determined that plaintiff failed to set forth a claim for wrongful discharge in violation of public policy under *Suchodolski*, *supra*, because, although plaintiff argued throughout the proceedings that being fired for refusing to lie at the arbitration hearing violated public policy, he failed to properly allege in his complaint that Young violated any law, or to otherwise set forth a claim actionable under *Suchodolski.* However, the trial court noted that this Court has established that a violation of "law" as intended by *Suchodolski* may include "public policy . . . based on principles derived from authoritative sources other than statutes." *Vagts, supra* at 485-486. We emphasize that the language defining the exception in *Suchodolski* permits a claim "if the discharge was contrary to public policy," not "if the discharge arose from the violation of a statute." We agree with the trial court's conclusion that there is a clear public policy against testifying falsely, even in a quasi-judicial proceeding. See *Cunningham v Citizens Ins Co of America*, 133 Mich App 471; 350 NW2d 283 (1984). Therefore, plaintiff need not prove that what Young asked him to do fit the statutory definition of "perjury." The trial court encouraged plaintiff to amend his complaint to state the relevant perjury statute and to set forth a theory under the broader meaning of "law" used in *Suchodolski*. Plaintiff need not name a specific statute embodying public policy, and we believe his first amended complaint successfully pleaded a public policy exception to the employment-at-will doctrine, namely that plaintiff was fired for refusing to lie at an arbitration hearing. Whether defendant's acts amounted to a violation of public policy remains a question of fact. The trial court therefore should not have dismissed plaintiff's claim against Young, or at least should have granted leave to amend, as it originally indicated it would do.

Plaintiff also argues that the trial court erred when it denied his motions for leave to amend his complaint. Because the trial court erroneously determined that Young was immune, it incorrectly held that any amendment concerning his liability for wrongful discharge would be moot. Plaintiff should have been granted leave to file a second amended complaint if he wanted to tailor his allegations to *Suchodolski* as encouraged by the trial court.

However, the trial court did not err in denying plaintiff's amendments proposing to plead that he was fired in violation of Const 1963, art 1, § 17 and 42 USC 1983. We will not disturb the trial court's decision to grant or deny leave to amend a complaint absent an abuse of discretion that resulted in an injustice. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would conclude that there was no justification or excuse for the ruling. *Detroit/Wayne County Stadium Authority v 7631 Lewiston*, 237 Mich App 43, 47; 601 NW2d 879 (1999). Although a trial court should freely grant leave to amend a complaint when justice so requires, a motion may be denied for reasons of undue delay or prejudice, bad faith, repeated failure to cure deficiencies, or for futility. MCR 2.118(A)(2); *Weymers, supra* at 658; *Phillips, supra*.

It is well settled that an at-will employee has no right to due process under Const 1963, art 1, § 17. *Bracco, supra* at 586 n 3; *James v City of Burton*, 221 Mich App 130, 134; 560 NW2d 668 (1997). The cases on which plaintiff relies are distinguishable in that the employees had due process rights based on their employers' rules or ordinances. See *Casad v City of Jackson*, 79 Mich App 573, 578; 263 NW2d 19 (1977); *Milford v People's Community Hospital Auth*, 380 Mich 49; 155 NW2d 835 (1968). In contrast, Wayne had no policy conferring the

right to a hearing before termination for at-will employees such as plaintiff. We therefore conclude that plaintiff's constitutional claim was futile, and the trial court did not abuse its discretion when it denied plaintiff's motion for leave to amend.

Plaintiff's efforts to amend his complaint to plead a violation of 42 USC 1983 were likewise futile. To establish a valid § 1983 claim, that defendants deprived plaintiff of the "rights, privileges or immunities secured by the Constitution and laws of the United States," plaintiff must demonstrate that a government actor deprived him of clearly established constitutional or statutory rights. *Thomas v McGinnis*, 239 Mich App 636, 644-645; 609 NW2d 222 (2000); *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 74; 592 NW2d 724 (1998). Plaintiff is unable to maintain a claim under § 1983 for the same reason that his constitutional claim is futile: an at-will employee has no property interest in his or her job for due process purposes. *Bishop v Wood*, 426 US 341, 345-347; 96 S Ct 2071; 48 L Ed 2d 684 (1976), overruled on other grounds by *Cleveland Bd of Educ v Loudermill*, 470 US 532, 540-541; 105 S Ct 1487; 84 L Ed 2d 494 (1985) (holding that once a property right is conferred, the due process guarantees cannot be limited); see also *Perry v Sniderman*, 408 US 593, 597-598; 92 S Ct 2694; 33 L Ed 2d 570 (1972). To the extent that plaintiff argues that *Haddle v Garrison*, 525 US 121; 119 S Ct 489; 142 L Ed 2d 502 (1998), confers on an at-will employee the right to advance a claim under 42 USC 1983, plaintiff has waived the issue on appeal by failing to provide any authority for the proposition that the Supreme Court's analysis of § 1985(2) in *Haddle* has any bearing on the instant case. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116; 593 NW2d 595 (1999). For the foregoing reasons, we hold that the trial court did not abuse its discretion when it denied plaintiff's motions for leave to amend his complaint to plead that he was fired in violation of Const 1963, art 1, § 17 and 42 USC 1983.

Affirmed in part and reversed in part.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Patrick M. Meter